

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

CASE NO. S-2585

PETITION OF GERTRUD AND WOLFGANG J. MERGNER

OPINION OF THE BOARD

(Effective Date of Opinion: March 17, 2004)

Case No. S-2585 is an application, pursuant to Section 59-G-2.00 of the Zoning Office, to permit an accessory apartment. Pursuant to the provisions in Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner for Montgomery County to conduct a public hearing and submit a report and recommendation. The Hearing Examiner convened a public hearing on November 21, 2003, and on December 17, 2003, issued a Report and Recommendation for approval of the special exception.

The subject property is Lot 34, Block 6, B.F. Gilbert's Subdivision, at 104 Tulip Avenue, Takoma Park, Maryland in the R-60 Zone.

Decision of the Board: Special exception **granted** subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on January 7, 2004. After careful consideration, and review of the record, the Board adopts the Report and Recommendation and grants the special exception, subject to the following conditions:

1. The Petitioners shall be bound by their testimony and exhibits of record, including but not limited to Exhibit Nos. **3**, 4 and 6.
2. Occupancy of the accessory apartment shall be limited to two unrelated persons, or a family of three.
3. The Petitioners shall maintain one of their four off-street parking spaces solely for the use of the occupant or occupants of the accessory apartment; and
4. The Petitioners must submit any proposed future exterior modifications on any portion of the subject property to the Historic preservation Commission and to the Historic Preservation Section of the MNCPPC for their review and approval prior to the commencement of such modifications.

Therefore, based upon the foregoing, on a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Donna L. Barron, Louise L. Mayer and Donald H. Spence, Jr., Chairman in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of March, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
GERTRUD AND WOLFGANG J. MERGNER, *
Petitioners *

Gertrud Mergner *
Wolfgang Mergner *
For the Petition *

Kevin Martell *
Barbara Foresti *
Department of Housing and *
Community Affairs *

Board of Appeals Case No. S-2585
(OZAH Referral No. 04-08)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS	PAGE
I. STATEMENT OF THE CASE	4
II. BACKGROUND	5
A. The Subject Property	6
B. Proposed Use	7
C. The Neighborhood and its Character	9
D. The Master Plan.....	12
E. Community Response	12
III. SUMMARY OF THE HEARING	13
IV. FINDINGS AND CONCLUSIONS.....	17
A. Standard for Evaluation.....	17
B. General Conditions	19
C. Specific Standards	25
D. Additional Applicable Standards	29
V. RECOMMENDATION	30

I. STATEMENT OF THE CASE

Petition No. S-2585, filed on June 17, 2003, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 104 Tulip Avenue, Takoma Park, Maryland 20912. The subject property is designated Lot 34 of Block 6 in the B.F. Gilbert's Subdivision of Takoma Park, and it is zoned R-60 (Tax Account No. 02351628).

On July 22, 2003, the Board of Appeals issued a notice that a hearing in this matter would be held on October 8, 2003, at 10:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building. On September 10, 2003, the Board of Appeals adopted a resolution referring this case to the Hearing Examiner for Montgomery County to conduct a public hearing and issue a written report and recommendation to the Board of Appeals for final action. On September 25, 2003, the Office of Zoning and Administrative Hearings issued a notice rescheduling the hearing to November 21, 2003 at 9:30 a.m. (Exhibit 15).

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated November 14, 2003, recommended approval of the petition on certain conditions (Exhibit 16).¹

The Department of Housing and Community Affairs inspected the property on November 18, 2003, and determined that "the unit may be occupied by two unrelated people or . . . a family of three" (Exhibit 17).

A public hearing was convened as scheduled on November 21, 2003, and testimony was presented by Petitioners, Mr. and Mrs. Mergner, acting *pro se*, in support of the Petition. Mr.

¹ The Technical Staff Report is frequently quoted and paraphrased herein.

Kevin Martell, Housing Code Field Supervisor of the Division of Housing and Code Enforcement, Department of Housing and Community Affairs, also appeared and testified that the proposed accessory apartment meets all housing code requirements (Tr. 33). Barbara Foresti, Program Specialist with the Department of Housing and Community Affairs testified with regard to accessory apartments in the Takoma Park area (Tr. 34-35).

Petitioners have agreed to meet all the conditions set forth in the M-NCPPC Technical Staff Report (Ex. 16). The only real issue in this case is whether there is too high a concentration of accessory apartment uses in the immediate area of the subject property.² This issue came up once before regarding the same property, when a special exception for an accessory apartment was sought in 1989 under Petition S-1556. The Board denied the special exception on April 6, 1989, on grounds that (at the time) the house was only two years old and therefore did not meet the statutory requirement [§ 59-G-2.00(a)(4)] that it be five years old on the date of application. The Board also stated the following:

In addition, the Board finds that there is a concentration of accessory apartments in Takoma Park and one of the findings that the Board must make is that the accessory apartment will not result in an excessive number of similar uses (apartments) in the general neighborhood. Although the Board has not enforced this finding in regard to the many pre-existing accessory apartments in Takoma Park, the Board has the obligation to avoid a further proliferation of new apartments.

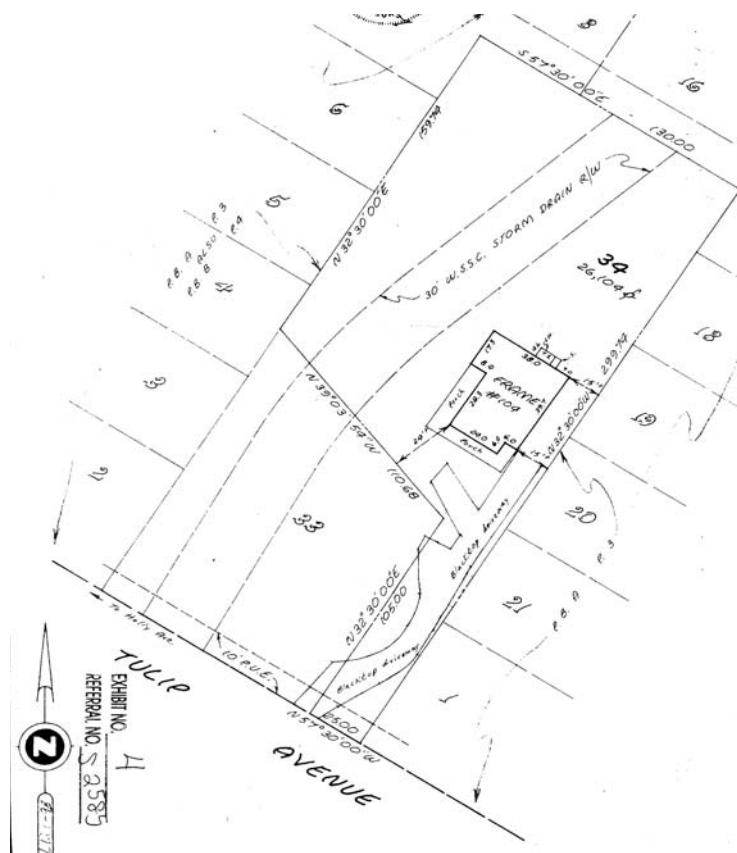
Of course, the house in question is now much more than the required five years old; however the concentration of accessory apartments is still an issue. Nevertheless, as will be explained more fully below, the Hearing Examiner finds that the number of accessory apartments currently in the area is not so great as to warrant denial of the Petition at this time.

II. BACKGROUND

² Technical Staff raised a second issue, whether the sign was posted in a sufficiently visible location. The Hearing Examiner raised this question at the hearing (Tr. 7-8) and is satisfied that the sign was posted in a manner such that adequate notice was given.

A. The Subject Property

As noted above, the subject property is located at 104 Tulip Avenue, Takoma Park, Maryland 20912, and it is designated Lot 34 of Block 6 in the B.F. Gilbert's Subdivision of Takoma Park, in the Takoma Park Historic District. It is zoned R-60. The lot is approximately 26,104 square feet, and is flag-shaped, with a 150 foot long, and approximately 12 foot wide, driveway (which is shared with the adjacent property but located on the subject property). The end of the driveway, combined with the other 13 foot width of the "flagpole," form the subject property's only frontage (25 feet wide) along Tulip Avenue. The lot slopes down to the rear and the west, and there is a 30 foot wide WSSC storm drain right-of-way running through it. To better understand this case, it is helpful to view the Building Location Plat (Exhibit 4).



The Mergners' home is a two and a half story frame dwelling, with a covered porch on both the front and the western side. There is a large rear yard and a walkout basement, which is

where the accessory apartment is located. The front of the Mergner home is depicted below in Exhibit 8(a):



Main entrance of the house. The apartment is to the left around the corner and the steps to the apartment are hidden behind the grasses and hostas.

According to the Technical Staff Report (Exhibit 16), there are three off-street areas that can accommodate parking other than the main portion of the driveway, namely a) a paved parking area to the west of the driveway and in front of the house that can accommodate two cars, b) a parking area near the front of the property and to the east of the driveway that can accommodate one car, and c) a paved parking area (the end of the driveway) to the east of the house that can accommodate one car.

B. The Proposed Use

As mentioned above, the accessory apartment is located in the basement of the house. It has a separate entrance from a porch on the west side of the home, as depicted below in Exhibits 8(b) and (c).



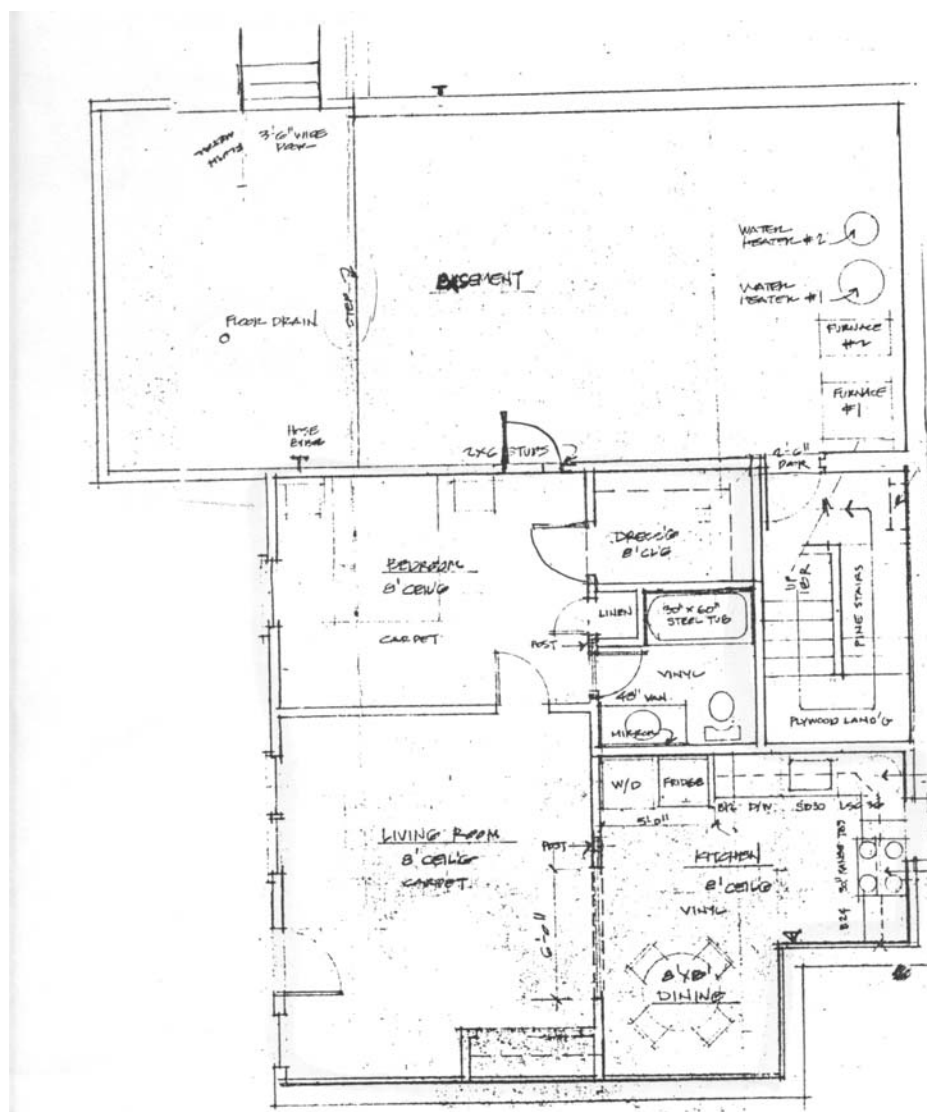
This shows the entrance to the apartment from the west site of the property.



This view shows the entrance of the apartment with porch closed up. EXHIBIT NO. 86

It contains a living room, a kitchen, a bathroom and a bedroom, all of which occupy about 608.5 square feet, according to Technical Staff's estimate.³ A copy of the accessory apartment layout (Ex. 6) is shown below:

³ Petitioners list the space as being 664 square feet and Technical Staff estimates about 608.5 square feet. Both of these differ from Mr. Martell's measurement of 426 square feet. The Hearing Examiner questioned Mr. Martell about this discrepancy at the hearing (Tr. 11-13), and he explained that the Department of Housing and Community Development, pursuant to the Housing Code, measures only "habitable floor space," which does not include



C. The Neighborhood and its Character

The neighborhood is residential in character and consists of mainly single-family homes, on land zoned R-60 in this Historic District. Technical Staff defined the neighborhood as the “area bounded by Eastern Avenue to the southwest, Piney Branch Road to the northwest,

bathrooms or any area less than seven feet wide (thus excluding the entire kitchen here because it is narrowed by cabinets). For purposes of this Report, we have used the Technical Staff’s estimate of 608.5 square feet, because it more accurately conveys the portion of the home being occupied by the accessory apartment than does the Housing Department measurement, which is addressed more to questions of habitability.

Philadelphia Avenue to northeast, and Maple Avenue to the southeast.” The Petitioners’ property location is highlighted on the Technical Staff’s “Defined Neighborhood Map”, below:



Tulip Avenue is a two-way street that begins at Holly Avenue, a half block to the northwest of the subject property, and runs southeast to Carroll Avenue. According to the Staff Report, the paved width of the portion of Tulip Avenue in front of the subject property is approximately 24 feet. Tulip Avenue is curbed and has a sidewalk along the north side for the full length of the subject street block. Signs stating “No Parking Anytime” are posted on the

south side of Tulip Avenue in the subject street block and signs stating “Permit Parking Only – Monday to Friday, 8:00 a.m. to 7:00 p.m.” are posted along the north side of the street in the subject street block.

The Technical Staff reports that “parking was fairly heavy along the north side of the street at the time of staff’s site visit.” (Exhibit 16, p. 4) Bus service is available on Carroll Avenue, Eastern Avenue, Philadelphia Avenue, Maple Avenue, Piney Branch Road, and Ethan Allen Avenue.

The Technical Staff found the following concentration of special exceptions “applications” in the general area (Exhibit 16, p. 6):

VERY CLOSE TO SUBJECT PROPERTY:

- S-1566 Accessory Apartment, 7201 Holly Avenue, approved 4/6/89.
- S-1528 Accessory Apartment, 7203 Holly Avenue, approved 3/9/89.
- S-1166 Accessory Apartment, 7209 Holly Avenue, abutting subject property, approved 1/6/86.
- S-1715 Accessory Apartment, 7217 Holly Avenue, approved 10/19/89.
- S-1802 Accessory Apartment, 102 Tulip Avenue, abutting subject property, dismissed 8/2/90.
- S-2161 Accessory Apartment, 7118 Cedar Avenue, approved 5/19/95.
- S-1022 Accessory Apartment, 210 Tulip Avenue, approved 2/13/85.

NEARBY:

- SE-247 Piney Branch Road, no information available.
- S-2157 Accessory Apartment, 7404 Holly Avenue, approved 4/26/95
- S-1530 Accessory Apartment, 7301 Birch Avenue, approved 3/9/89.
- S-1744 Accessory Apartment, 7309 Holly Avenue, approved 12/7/89.
- S-1520 Accessory Apartment, 7313 Cedar Avenue, approved 12/21/94.
- S-949 Accessory Apartment, 7300 Cedar Avenue, approved 10/3/84.
- S-1382 Accessory Apartment, 7303 Cedar Avenue, approved 3/16/88.
- S-1492 Accessory Apartment, 7310 Maple Avenue, approved 7/11/88.
- S-1347 Accessory Apartment, 7403 Maple Avenue, approved 11/20/86.
- S-900 Group Residential Facility for Exceptional Persons (ambulatory elderly), 7420 Maple Avenue, approved 1/18/84.
- S-2498 Large Group Home, 7420 Maple Avenue, approved 5/2/02.

The Technical Staff notes, however, that a number of these accessory apartments in the area are no longer operational (*e.g.*, S-1022 and S-1744), and the status of others was being

checked by the Department of Housing and Community Development. The witnesses from that Department clarified the situation at the hearing, as will appear in the Hearing Summary in Part III, below.

D. The Master Plan

The property is located within the area covered by the *Takoma Park Master Plan*, approved and adopted in December 2000. The *Plan* does not explicitly address the question of accessory apartments, but it does emphasize accepting a diversity of housing types in the community, and it supports the R-60 zoning which permits accessory apartments as a special exception. The Technical Staff noted that accessory apartments are an excellent source of moderately priced housing and concluded that “the proposed accessory apartment, in its specifics and as a proposed land use, is in conformance with the guidance in the Master Plan.”

Moreover, because Petitioners plan no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area. Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable Master Plan.

E. Community Response

There has been no community opposition to the proposed accessory apartment. On the contrary, two letters were received from neighbors in support of the Petition. The first one was sent in on July 31, 2003, by Diane MacEachern and Richard Munson of 102 Tulip Avenue, the Mergners’ next door neighbors (Exhibit 13). They state that “we have no objection to [the Mergners’] application.” According to the Housing Department witnesses at the hearing, these neighbors withdrew their own accessory apartment application years ago (Tr. 27). At the hearing, Mr. Mergner presented a letter dated November 20, 2003, from another abutting

property owner, Linda Leach of 7203 Holly Avenue (Exhibit 22). Ms. Leach stated that the accessory apartment in her home had been occupied for 47 years by a renter who just died, and that Ms Leach and her husband do not intend to rent it out again. She and her husband “wholeheartedly hope that our permission will be transferred to [the Mergners].”

In sum, the only response from the community has been supportive of the Mergners’ Petition for a special exception.

III. SUMMARY OF THE HEARING

Four witnesses testified at the hearing, the Petitioners (Mr. and Mrs. Mergner) and personnel (Kevin Martel and Barbara Foresti) from the Housing Department.

Petitioners’ Testimony:

At the beginning of the hearing, Mrs. Mergner submitted an Affidavit of Posting (Exhibit 19) and a copy of the deed to the subject property (Exhibit 20) showing that the Mergners purchased the property in 1987. The Mergners also submitted a typed-out statement in support of their application, which was admitted to the record as Exhibit 21. Attached to it was the letter, mentioned above, from an a nearby property owner, Ms. Leach, supporting Petitioners’ application (Exhibit 22).

The Hearing Examiner asked the Mergners about the Technical Staff’s possible issue with the posting of the sign. The Mergners testified that the sign, as initially posted, was visible from the street, but the bottom half was partially obscured by their fence. When Sandra Youla of the Technical Staff came by on September 24, 2003, and mentioned the problem, the sign was moved to a position in front of the fence on the same day (Tr. 7-8). The sign has remained in front of the fence since that time (Tr. 8). Given that the hearing in this matter did not take place until November 21, 2003, and the record did not close until December 1, 2003, the Hearing

Examiner finds that the Notice was posted and completely visible for a sufficient period of time to satisfy statutory notice requirements (*i.e.*, more than 60 days prior to the record closing).⁴

The Mergners testified that they were agreeable to the conditions set forth by the Technical Staff in its Report and the Housing Inspector in his report (Tr. 9). Mrs. Mergner testified that the reason Mr. Martell's measurement of the accessory apartment came out different from her own was that Mr. Martell did not include closets, cabinets and bathroom space. Mr. Martell confirmed this fact, and added that floor space in hallways and lobbies is also not counted, and even the kitchen was not included in the measurement here because it was not seven feet wide. That, according to Mr. Martell is pursuant to the Housing Code's prescription for determining "habitable floor space" (Tr. 12-13). Thus, Mr. Martell's measurements yielded 426 square feet, while Petitioners' measurement yielded 664 square feet.⁵

Mrs. Mergner further testified that area she is attempting to convert into an accessory apartment had served as a registered living unit (Exhibit 11) for her children after college (Tr. 14). Mrs. Mergner stated that she and her husband are retired and need the extra income from renting the accessory apartment. They also want the premises to be occupied while they travel. They plan to stay in Takoma Park, and they are very involved in the community, teaching part time, doing neighborhood patrol and serving on the Public Citizens Advisory Committee and the Board of the Takoma Park Remediation Program. Mrs. Mergner also testified that her home is only five minutes from the Metro, thereby allowing a tenant to easily use public transportation (Tr. 15).

Mrs. Mergner testified that she had talked to almost all of the adjoining and confronting

⁴ The 60 day period is used as a measure of the reasonable time for the sign to be posted because Sec. 59-A-4.41(b) allows the Board to schedule a hearing 60 days after the notice of filing the petition is mailed out. The sign in the subject case was actually posted for a longer period, but we know that it was completely visible for at least 68 days before the record closed on December 1, 2003, giving anyone who wished to protest plenty of notice time.

⁵ As mentioned in footnote 3, above, the Hearing Examiner has used the Technical Staff's estimate of 608.5 square feet in this report.

neighbors and that she was “assured that the neighbors have no objections for us to have an accessory apartment.” Even the neighbors with whom the Mergners share a driveway, Diane MacEachern and Richard Munson, wrote a letter supporting the Mergners’ Petition (Exhibit 13). Mrs. Mergner also read aloud the letter from Mrs. Leach (Exhibit 22), which is quoted in Part II.E. of this report. Finally, Mrs. Mergner discussed the status of other accessory apartments in the immediate area, which will be summarized below in connection with the testimony of Mr. Martell and Ms. Foresti.

In questioning by the Hearing Examiner, Mr. and Mrs. Mergner testified as to their compliance with each of the general and specific standards for obtaining an accessory apartment special exception (Tr. 21-25). Specifically, there would be only one accessory apartment; the apartment would have at least one party wall in common with the main dwelling; the home is sixteen years old; there is no family of unrelated persons on the premises; there is no guest room or boarding house on the premises; there is a separate entrance for the accessory apartment that preserves the appearance of a single family home; there are no modifications planned to the external part of the house; the accessory apartment would have the same street address as the main dwelling; the accessory apartment would occupy less than 1200 sq ft; the owners, Mr. and Mrs. Mergner would occupy the main dwelling; more than a year has elapsed (sixteen according to Mr. Mergner) since the owner purchased the property; compensation will be received by Mr. Mergner for only one dwelling unit; the lot, being 26,104 square feet, exceeds the 6,000 sq ft minimum lot size; the accessory apartment will be in harmony with the general character of neighborhood, as two of his neighbors stated in letters that they did not object to it (Exhibits 13 and 22); the accessory apartment would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties; there would be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity; the accessory apartment would not

adversely affect the health, safety, security, morals or general welfare of the residents; and finally, it would be served by adequate public facilities and would not reduce the safety of vehicular or pedestrian traffic.

Testimony of the Housing Department Personnel:

In addition to explaining how he arrived at his floor space measurement (discussed above), Mr. Martel testified with regard to the numbers of other accessory apartments in the area. He introduced Exhibit 23, which shows the locations of the accessory apartments relative to Petitioners' residence, although a number of those depicted are no longer active, as shown below.

S-1566	Accessory Apartment, 7201 Holly Ave., approved 1989 –	Still Active.
S-1528	Accessory Apartment, 7203 Holly Ave., approved 1989 –	Will not rent
S-1166	Accessory Apartment, 7209 Holly Ave., approved 1986 –	Still Active
S-1715	Accessory Apartment, 7217 Holly Ave., approved 1989 –	Still Active
S-1802	Accessory Apartment, 102 Tulip Ave., dismissed 1990 –	Withdrawn
S-2161	Accessory Apartment, 7118 Cedar Ave., approved 1995 –	Still Active
S-1022	Accessory Apartment, 210 Tulip Ave., approved 1985 –	Revocation Pending

Thus, only four of the seven accessory apartments reported to be in the immediate area of the Mergners are actually adding to the concentration of such uses in the area. Mr. Martell concluded by stating that, although there is an over-concentration issue, the Mergners take care of their property and this [Petition] is “legitimate and I do believe that this should be granted.” The accessory apartment meets all housing code requirements (Tr. 33).

Ms. Foresti testified that the unusual concentration of accessory apartments was due to the World War II need for housing in the area. Many homes had multiple accessory apartments, and were given the opportunity under the accessory apartment program to retain only one (Tr. 34-35). Ms. Foresti concluded that a lot of “excessive concentration” had been eliminated because all the former multiple units are down to only one accessory apartment each.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment.

Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with an accessory apartment include:

the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit.; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian traffic, and parking activity; and the potential for additional noise from that additional household. (Exhibit 16)

The Technical Staff also noted that there are some unusual site conditions in this case, such as the shape of the lot, its large size, its steeply sloping terrain in places and its combination of wooded and open areas. The Staff concluded that “these characteristics, however, create no adverse effects and in fact serve to isolate the impacts of the proposed use from the neighbors.” Technical Staff found “no non-inherent adverse effects arising from the accessory apartment as detailed in the application” (Exhibit. 16). Similarly, Mr. Martel, a Housing Code field Supervisor, testified that, in his opinion, the special exception should be granted (Tr. 33).

The undersigned concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects

of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

That is the case here. There will be no external change to the structure. The Petitioners have agreed to make one of their of-street parking spaces available to the tenant, thereby reducing the impact of an extra vehicle, if there is one. Nevertheless, the site conditions in this case do create the possible non-inherent adverse effect of over-concentration of accessory apartments, which the Technical Staff discusses thoroughly, but not in the context of non-inherent adverse effects. This possible non-inherent adverse effect will be discussed below with regard to Code Section 59-G-1.21(7), the provision that deals with concentration-of-use issues. Suffice it to say that the Hearing Examiner reaches the same ultimate conclusion as the Technical Staff and the Housing Code Field Supervisor – this Petition should be granted.

In sum, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, I conclude that there are no non-inherent adverse effects from the proposed use which would require denial of the Petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the testimony of the Petitioners and the Housing Code Inspectors provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The Takoma Park Master Plan, approved and adopted, December 2000, recommends “retain[ing] the existing single-family detached character throughout most of Takoma Park [and] the existing mix and distribution of apartment uses . . .” (p. 28). Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the applicable Master Plan. Moreover, the Technical Staff noted that the County Council is supportive of mechanisms to provide affordable housing in the County, and accessory apartments are one such mechanism. Thus, the Staff concludes, and I agree, that the proposed use is consistent with the Master Plan and the general plan for development in the County.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and*

character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because no structural change to the house or its driveway is proposed. As to parking, the existing dwelling has room for four off-street parking spaces, and Petitioners have agreed to make one of them available to their new tenant. Thus, there should be no impact on the neighborhood as far as parking. The proposed use will not generate any significant change in traffic conditions. In fact, given the proximity of this property to a Metro station, living in the proposed accessory apartment may actually eliminate a tenant's need to own a car.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use, the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of*

special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: As mentioned in the first part of this Report, the key issue in this case is whether the accessory apartment proposed in this case would create an over concentration of special exception uses in the area. The opinion of the Technical Staff is instructive on this point (Exhibit 16):

Staff also finds that the addition of this special exception will not result in an excessive concentration of special exception uses in general or accessory apartments in particular, and thus will not adversely affect the area or alter its residential character.

Staff acknowledges that there are many special exceptions, particularly accessory apartments, operating in the neighborhood. However, Takoma Park has always tolerated and anticipated a wide variety of housing types, as alluded to by the Master Plan and confirmed by the Community-Based Planners of MNCPPC and the Takoma Park Planner at the City of Takoma Park. These planners feel that as long as there is sufficient parking and that there are no additions/extensions to the structure that would adversely affect the neighborhood, neighborhood character is not be impaired in any way. Further, the Takoma Park County Council is aware of the application and had no comments, and staff also received no comments from the community.

. . . Here, staff finds that there are no such non-inherent adverse effects: the apartment has existed as a registered living unit for many years without apparently creating any problems, there is sufficient on-site parking, the houses in this neighborhood are large and have accommodated accessory apartments over the years without problem, and the topography and shape of the lot serve to isolate the use and its impacts from its neighbors.

Thus, in this case, staff's own assessment in combination with advice from the Master Plan, the opinions of relevant officials, and the lack of community comment lead staff to conclude that the addition of the proposed accessory apartment is acceptable . . .

In addition to the important points made by the Technical Staff, it should also be remembered that there has been no opposition at all to this

Petition; that in fact the neighbors who would be most affected by the addition of the subject accessory apartment have supported the Petition in writing; that three of the seven accessory apartments listed in the Technical Staff Report as being in the immediate area are actually not in use; and that the subject property is quite close to a Metro Station, thereby potentially reducing the need for an additional vehicle.

Given all of these circumstances, the Hearing examiner concludes that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities (Tr. 32).

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special*

exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review (“LATR”) and the Policy Area Transportation Review (“PATR”). The Technical Staff did do such a review, and it is contained in Transportation Planning Staff’s Memorandum of November 13, 2003 (Exhibit 18). Since the existing house, combined with the proposed accessory apartment, would generate fewer than 50 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study (Exhibit 18). See the July 2002 LATR Guidelines, of which the Hearing Examiner takes official notice.

Turning to the PATR, the FY 2003 Annual Growth Policy (“AGP”) transportation staging ceilings show remaining capacity of 1220 housing units in the Silver Spring/Takoma Park policy area as of September 30, 2003 (Exhibit 18). Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the PATR test, as well as the LATR test.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the*

proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The Transportation Staff concluded that the proposed special exception “will have no adverse effect on area roadway conditions” or on “pedestrian access or safety” (Exhibit 18). Thus, the evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 16) and the Memorandum from the Department of Housing and Community Affairs (Ex. 17)] provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

(1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

(i) The lot is 2 acres or more in size; and

- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of the main dwelling and therefore shares a wall in common, as required for a lot of this size.

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension of the main dwelling is proposed.

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The original house was built in 1987 (Tr. 22 and Exhibit 20). It therefore meets the “5 year old” requirement.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

Petitioners are seeking to convert a registered living unit (Exhibit 11) into an accessory apartment.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is through a side door to the basement.

There will be no change to the appearance of the dwelling.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications are proposed.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is contained within the main dwelling and clearly is subordinate to the main dwelling, as it occupies approximately 608.5 square feet in the basement of a two and a half story home.

59-G § 2.00(b) Ownership Requirements

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners proved their ownership of the subject property by submission of a copy of their deed (Exhibit 20) at the hearing. Petitioners live in the main dwelling and plan to continue living there (Tr. 24).

(2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners acquired the property in 1987 as demonstrated by their deed (Exhibit 20), easily more than one year before the filing of the petition.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: The Petitioners will receive compensation for only one dwelling unit (Tr. 24).

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioners are the owners of the property (Exhibit 20, Tr. 24).

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is approximately 26,104 square feet in size. The following chart from page 10 of the Technical Staff Report (Exhibit 16) demonstrates compliance with all development standards:

Development Standard R-60 Zone	<i>Required/Allowed</i>	<i>Provided</i>	<i>Compliance</i>
Maximum Building Height:	2.5 stories or 35 feet	2.5 stories	Yes
Minimum Lot Area	6,000 square feet	26,104 square feet	Yes
Minimum width at: Front building line	60 feet	129 feet	Yes
Street line	25 feet	25 feet	Yes
Minimum Front Yard Setback	25 feet	303 feet (approx.)	Yes
Minimum Side Yard Setback	8 feet (sides) 18 feet (sum of both)	15 feet, 76 feet 91 feet	Yes Yes
Minimum Rear Yard Setback	20 feet	111 feet	Yes
Maximum building coverage	35%	<35%	Yes
Maximum Floor Area for Accessory Apartment	1,200 square feet	608.5 square feet (approx.)	Yes

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: This issue has been dealt with at length in the discussion of Code Section 59-G-1.21(a)(7), in Part IV.B, above. In the opinion of the Technical Staff, this special exception, if granted, will not result in an excessive concentration of similar uses in the general neighborhood. The undersigned agrees.

- (3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*
- (i) More spaces are required to supplement on-street parking; or*
 - (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: There is sufficient on-site parking (four off-street spaces) to accommodate the proposed use. However, the Technical Staff recommends, and the Hearing Examiner agrees, that a condition of the Special Exception should be that Petitioners dedicate one of the off-street spaces to the occupant of the accessory apartment.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. In this case, Mr. Kevin Martell, testifying for that Department, found that the proposed

accessory apartment will meet all current standards and may be occupied by two unrelated people or by a family of three (Exhibit 17).

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2585, seeking a special exception for an accessory apartment located at 104 Tulip Avenue, Takoma Park, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by Petitioners' testimony, representations and exhibits of record;
2. The Petitioners will house no more than two unrelated persons or a family not exceeding three persons in the accessory apartment;
3. The Petitioners must maintain one of their four off-street parking spaces solely for the use of the occupant or occupants of the accessory apartment; and
4. The applicants must submit any proposed future exterior modifications on any portion of the subject property to the Historic Preservation Commission and to the Historic Preservation Section of the MNCPPC for their review and approval prior to the commencement of such modifications.

Dated: December 17, 2003

Respectfully submitted,

Martin L. Grossman
Hearing Examiner